

SUMMARY ANALYSIS OF AMENDED BILL

Franchise Tax Board

Author: Burton and McPherson Analyst: Marion Mann DeJong Bill Number: SCA 7

Related Bills: See Prior Analysis Telephone: 845-6979 Amended Date: 05/16 & 6/17/2002

Attorney: Patrick Kusiak Sponsor: CA Newspaper Publishers Assoc.

SUBJECT: Access to Government Information

DEPARTMENT AMENDMENTS ACCEPTED. Amendments reflect suggestions of previous analysis of bill as introduced/amended _____.

AMENDMENTS IMPACT REVENUE. A new revenue estimate is provided.

☒ AMENDMENTS DID NOT RESOLVE THE DEPARTMENT'S CONCERNS stated in the previous analysis of bill as introduced January 10, 2002.

FURTHER AMENDMENTS NECESSARY.

☒ DEPARTMENT POSITION CHANGED TO No Position.

☒ REMAINDER OF PREVIOUS ANALYSIS OF BILL AS INTRODUCED January 10, 2002, STILL APPLIES.

OTHER - See comments below.

SUMMARY

This is a proposal to place a constitutional amendment on the ballot that would make access to information concerning the conduct of the people's business a constitutional right of California citizens.

SUMMARY OF AMENDMENTS

The June 17, 2002, and the May 16, 2002, amendments extensively changed the text of this proposed constitutional amendment. However, the original intent and goal of making access to information a constitutional right of California citizens was maintained.

The "This Constitutional Amendment" and "Implementation Consideration" discussions from the department's analysis of SCA 7 as introduced have been updated to reflect the May 16, and June 17, 2002, amendments. Also, additional implementation considerations have been provided below as a result of department staff's continued review of this proposal. The "Position" has been updated to reflect action taken by the Franchise Tax Board. The remainder of the department's analysis of SCA 7 as introduced still applies.

Board Position:

<input type="checkbox"/> S	<input type="checkbox"/> NA	<input checked="" type="checkbox"/> NP
<input type="checkbox"/> SA	<input type="checkbox"/> O	<input type="checkbox"/> NAR
<input type="checkbox"/> N	<input type="checkbox"/> OUA	<input type="checkbox"/> PENDING

Legislative Director

Date

Brian Putler

8/8/02

POSITION

No Position.

On March 6, 2002, the Franchise Tax Board had a split vote on SCA 7 as introduced January 10, 2002, which resulted in no position being taken on this constitutional amendment.

ANALYSIS

THIS CONSTITUTIONAL AMENDMENT

This proposal would place a constitutional amendment on the ballot that would make access to information concerning the conduct of the people's business a constitutional right of California citizens. Specifically, this measure would:

- Provide that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in California.
- Specify that public agencies and officers exist to aid in the conduct of the people's business. Therefore, their actions and deliberations should be open to public scrutiny.
- Make it a constitutional right for a person to attend, observe, and be heard in the meetings of elected and appointed public bodies. The measure would also make it a constitutional right to inspect and obtain copies of records made or received in connection with the official business of any public body, agency, officer, or employee, or anyone acting on their behalf. This would include information regarding the official performance or professional qualifications of elected or appointed officials who have or appear to have substantial responsibility for or control over the conduct of governmental affairs. This would also include information regarding the professional qualifications of candidates or applicants for elective or appointive positions.
- Provide that this constitutional amendment may not be construed to supersede the right to privacy guaranteed by the California Constitution. In addition, it would not limit the ability of the Legislature to enact laws or the Judicial Council to provide rules consistent with statute for the protection of personal privacy.
- Authorize the Legislature by enacting laws or the Judicial Council by adopting rules (consistent with statute) to limit the right of access to information concerning the conduct of the people's business, but only if necessary to protect public safety or private property, to ensure the fair and effective administration of law, or to preserve public funds and resources.
- Require that in demonstrating the justification for nondisclosure, the public body, agency, officer, or employee must deny access based on either attorney-client privilege or particularized findings that a specific harm to the public interest cannot be averted by reasonable alternatives. The denial of access could be no broader in scope or longer in duration than necessary to avert the identified harm.
- Limits availability of information relating to peace officers by requiring requests for information to conform to procedures governing discovery or disclosure enacted by the legislature.

- Provide that the constitutional amendment would not apply to judicial proceedings, other than public interest proceedings, or judicial records.
- Stipulate that all statutes and rules of court limiting access to information concerning the conduct of the people's business that are in effect on the operative date of this constitutional amendment shall remain in effect until amended or repealed by the Legislature or determined to be unconstitutional by a court.

This constitutional amendment, if adopted, would no longer require a member of the public to show that records are public. Instead, the official in charge of records would be required to show that the information sought is not a public record.

IMPLEMENTATION CONSIDERATIONS

- Although the proposed constitutional amendment specifies that it would not immediately invalidate any existing laws that limit public access, it is unclear the extent to which adoption of this measure would result in existing laws eventually being found unconstitutional.
- The proposed measure provides constitutional authority for access to government records, limited only by the constitutional right to privacy and statutes that limit access based on specified criteria. Generally the constitutional right to privacy is limited to individuals. If existing statutes making business tax returns confidential are invalidated, the department may be required to disclose business tax returns and audit files. Public access to such information may prompt businesses to diminish the amount and quality of information provided for tax administration purposes. Any reduction in the quality or quantity of information provided by taxpayers may adversely affect tax administration.
- It is unclear how a person would exercise the rights provided by this measure during a hearing of a tax appeal before the Board of Equalization. Specifically, could any member of the public intervene during such a hearing?
- It appears that portions of the personnel file of the Executive Officer as well as other employees who could be considered holders of appointive office would be available to public inspection, to the extent such records "regard their official performance" or "regard their qualifications." Virtually every public employee is appointed. Unless the concept of "appointive office" is clarified, this constitutional amendment could be interpreted to allow the public access to the personnel record of *any* state employee.
- The proposed constitutional amendment provides that all existing statutes and rules of court limiting public access to governmental meetings and records shall remain in effect until amended, repealed, or "judicially determined" to be inconsistent with the proposed amendment. This provision could be interpreted to invalidate an existing statute regarding access to government records if a superior court makes a determination that the statute conflicts with the proposed constitutional amendment. Existing provisions of the California Constitution (i.e., Art. 3, Sec. 3.5) require a state administrative agency to apply an existing statute until an appellate court has made a final determination that the statute is unconstitutional. The author may wish to make this provision consistent with other existing provisions of the constitution.

- The proposed constitutional amendment requires the public agency to make a particularized finding that a specified harm to the public interest cannot be averted by reasonable alternative, unless the information sought is a “confidential communication between an attorney and his or her client conveyed to provide or obtain legal advice or representation.” Evidence Code section 952 defines the attorney-client privilege and a significant body of case law has been developed to interpret this privilege. Currently, communications in addition to those directly between the client and attorney are covered by the attorney-client privilege (e.g., the work of expert witnesses at the attorney’s direction). The author might consider amending the bill to specify that the information must be protected by the attorney-client privilege as defined by section 952 of the Evidence Code.

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